

October 8, 2014

William D. McMinn
Deputy General Counsel
3165 Pacific Highway
P O Box 120488
San Diego CA 92112-0488

Re: Your Request for Informal Assistance
Our File No. I-14-155

Dear Mr. McMinn:

This letter responds to your request for advice on behalf of Sergeant Donald Brick of the San Diego Harbor Police, San Diego Unified Port District (the “District”) regarding the conflict of interest provisions of the Political Reform Act (the “Act”) and Government Code Section 1090.¹ Please note that we do not provide advice on any other conflict of interest restrictions, if applicable, outside the Act or Section 1090. Because your inquiry is general in nature and does not involve specific governmental decisions, we are treating it as a request for informal advice.²

In regards to your request concerning Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General’s Office and the San Diego County District Attorney’s Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that the following advice is not admissible in a criminal proceeding brought under Section 1090 against any individual other than the requestor. (See Section 1097.1(c)(5).)

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

QUESTION

Do the conflict of interest provisions of the Act or Section 1090 prohibit Sergeant Brick from accepting employment with Customer Service Advantage, Inc. ("CSA"), a company where his wife is President and CEO?

CONCLUSION

The Act does not prohibit Sergeant Brick from holding a public position and also being employed by another entity such as a private business, firm, or nonprofit. However, he may not make a governmental decision that would affect his economic interests, including his employer.

Also, Section 1090 does not prohibit Sergeant Brick from working for CSA, provided he will not be making a contract with CSA, as discussed below.

FACTS

Sergeant Brick is employed by the District in the San Diego Harbor Police Department. He is a designated employee under the District's conflict of interest code. His wife is the President and CEO of CSA, which provides customer training, customer service consultation and project development for public agencies and private businesses. CSA has provided services to the District in the past and anticipates doing so in the future. You have indicated that contracts over a certain amount of dollars require approval by the District's board of directors and contracts below that amount are approved by staff. Sergeant Brick would like to work for CSA as an employee to perform general administrative duties.

Sergeant Brick will not participate in any decisions regarding agreements between CSA and the District. Currently, there are no pending decisions and your question is limited to whether Sergeant Brick may accept an employment offer from CSA.

ANALYSIS

Political Reform Act

The Act's conflict of interest rules prohibit a public official from making, participating in making, or in any way attempting to use his or her official position to influence governmental decisions in which the official has a financial interest. The Act does not prohibit a public employee from holding a public position while working as an employee of a private company. (See *Shanks* Advice Letter, No. I-05-056; *Foster* Advice Letter, No. A-02-125.) Accordingly, Sergeant Brick is not prohibited under the Act from working for CSA. If, in the future, there are decisions before Sergeant Brick that involve CSA, we encourage you to request further advice.

Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.)

Holding a position with the District while working as an employee of CSA does not, in itself create a conflict of interest. If Sergeant Brick will participate in a District decision involving a contract with CSA, he will need to determine whether he has a conflict of interest, using the steps below.

We normally employ a six-step analysis to determine whether an official has a conflict of interest under Section 1090, but we need only address the first three steps as explained below.

Step One: Is the official subject to the provisions of Section 1090?

Section 1090 provides, in part, that “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by anybody or board of which they are members.” Section 1090 also applies to members of advisory bodies. (*City Council v. McKinley* (1978) 80 Cal.App.3d 204; 82 Ops.Cal.Atty.Gen. 126 (1999).) As an employee of the District, Sergeant Brick is subject to the provisions of Section 1090.

Step Two: Does the decision at issue involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); [FN2] 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.) Here, the District has entered contracts for services from CSA. And future contracts could create a conflict under Section 1090 if Sergeant Brick participates in making a contract and then attempts to gain financially from it by working for the private company.

Step Three: Is the official making or participating in making a contract?

Typically, a contract is “made” on mutual assent of the involved parties. (*Stigall, supra*, at p. 569.) In addition, making or participating in making a contract has been broadly construed to include those instances where a public official has influence over the contract or its terms. (See 80 Ops. Cal. Atty. Gen. 41.) No contract is “made” and no duties attach until one party has offered and another has accepted and consideration is exchanged. But before this, there are

“negotiations, discussions, reasoning, planning, and give and take,” all of which are instrumental in “making” the agreement. (*Stigall, supra, at p. 569.*)

Here, Sergeant Brick would like to enter into an employment contract with a company that has entered and will enter into contracts with the District, some of which are subject to approval by the District’s board and others by District staff that are not related to the Police Department. Your facts state clearly that Sergeant Brick did not have any involvement or participation with those contracts.

Additionally, Sergeant Brick will be entering into the employment contract with a private company with which he has no involvement in his public capacity. The Attorney General’s office has found that when a public employee is not making a contract (and has no input in its making) in his public capacity, he cannot be said to violate Section 1090 when he acts separately for his own private gain. (*80 Ops Cal. Atty. Gen. 41(1997).*) In a similar situation, two firefighters formed a private company and approached the fire chief about selling their product to the City. (*Ibid.*) The opinion found that the firefighters would not be involved as city employees if the contract moved forward beyond the fire chief to the city council, the body that would actually be making the decision. (*Ibid.*) Because the firefighters would not be making the contract, “including its embodiments,” and had no input into the procurement process, the Attorney General opinion concluded that there would be no Section 1090 violation.

Because Sergeant Brick has not and will not have input into any contract with CSA and is therefore not making a contract in his public capacity, he does not violate Section 1090 when he accepts employment from CSA. Given this conclusion, we do not reach the following steps of the analysis.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl